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No. 94-2093

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON,

Petitioner,

vs.

CLASS PLAINTIFFS IN MDL-551; CHEMICAL BANK; and WASHINGTON PUBLIC UTILITIES GROUP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

LIST OF PARTIES

CORPORATE DISCLOSURE STATEMENT
REQUIRED BY F.R.APP.P. 26.1

1. The following appellees are Washington State public utilities and municipalities:

Public Utility District No. 1 of Benton County
Public Utility District No. 1 of Clark County
Public Utility District No. 1 of Cowlitz County
Public Utility District No. 1 of Grays Harbor County
Public Utility District No. 1 of Lewis County
Public Utility District No. 3 of Mason County
Public Utility District No. 1 of Okanogan County
Public Utility District No. 2 of Pacific County
Public Utility District No. 1 of Skamania County
City of Ellensburg, Washington
City of Tacoma, Washington
Public Utility District No. 1 of Klickitat County.

2. Certain other appellees are the named class plaintiffs in *In re Washington Public Power Supply System Securities Litigation*, MDL551. None of those named plaintiffs has issued shares to the public.

3. Manufacturers Hanover Trust Company (whose successor by merger is Chemical Bank) identifies the following parent companies, subsidiaries and affiliates:

Chemical Banking Corporation
Brown & Company Securities Corporation
CBC-USA, Inc.
CBC Capital Partners, Inc.
CBC Holding (Delaware) Inc.

Chemical Bank Delaware
CBD Holdings Ltd.
SFC Agency, Inc. (OH)
Chemical DATA Services Corporation
Chemical Insurance Agency, Inc.
The CIT Group Holdings, Inc.
Chatham Ventures, Inc.
Chemadvertising, Inc.
Chemical Bank
Chemical Bank National Association
Margaretten Financial Corporation
Chemical Residential Mortgage Corporation
Margaretten Insurance Agency, Inc.
MRG Finance Company
Margaretten Financial Services
Margaretten Realty Co.
Chemical Business Credit Corp.
Chemical Capital Corporation
Chemical Capital Financing, Ltd.
Chemical Commercial Real Estate Advisors, Inc.
Chemical Connecticut Corporation
Chemical Educational Services Corporation
Tuition Plan Financial Services, Inc.
Chemical Equity Incorporated
Chemical Venture Capital Corporation
Chemical Corporate Advisers, Inc.
Chemical Financial Services, Inc.
Chemical Financial Services Corporation, Ltd.
Chemical Financial Services Corporation (AZ)
Chemical Financial Services Corporation (CA)
Chemical Financial Services Corporation (FL)
Chemical Financial Services Corporation (GA)
Chemical Financial Corporation (IL)
Chemical Financial Services Corporation (NC)
Chemical Financial Services Corporation of Penn.

Chemical Financial Services Corporation (TX)
Chemical Financial Services Corporation (WA)
Chemical Financial Services Corporation (CO)
Chemical Financial Services Corporation (IN)
Chemical Financial Services Corporation (KY)
Chemical Financial Services Corporation (LA)
Chemical Financial Services Corporation (SC)
Chemical Financial Services Corporation (TN)
Chemical Financial Credit Services Corporation (KY)
Sun States Life Insurance Company
Great Lakes Insurance Company
Lorry, Ltd.
Chemical Financial Investment Corporation
Chemical Financial Services Corporation (OH)
Chemical Financial Acceptance Corporation (OH)
Chemical Futures, Inc. (Inactive)
Chemical Futures & Options, Inc.
Chemical Futures Management, Inc.
Chemical Holding Delaware, Inc.
CBC Holdings (California), Inc.
Van Deventer & Hoch Chemical Thrift Holdings, Inc.
Chemical Bank F.S.B.
Chemical Trust Company of California
Chemical Investments, Inc.
Chemical International
Capital Finance Limited
Chemical Mortgage Securities
Chemical New Jersey Holdings, Inc.
Chemical Bank New Jersey National Association
Chemical Investor Services, Inc.
Princeton Bank and Trust Company
National Association Chemical New York, Inc.
Chemical New York-N.V.
Chemical Real Holdings, Inc.
Chemical Realty Corporation

Chemical Securities, Inc.
Chemical Structured Municipal Products Corporation
Chemical Securities Holdings, Inc.
Chemical Shareholders Services of California, Inc.
Chemical Shareholder Services Partners Inc.
Chemical Mellon Shareholder Services (50%)
Chemical Technologies Corporation
Electronic Customer Services, Inc.
Chemical Temporaries Incorporated
Chemical Trading Management Corporation
COREQ, Inc.
CVP Management Corp.
Manufacturers Hanover Leasing International Corp.
Manufacturers Hanover Leasing (Nassau) Limited
Manufacturers Hanover Arrendamento Mercantil S.A.
Manufacturers Hanover Wheelease Inc.
MH World Trade Corporation Mexico
Offshore Equities, Inc.
The Andean Fund, Inc.
Equifio
Chemical Overseas Holdings, Inc.
Select Andean Holdings, Inc.
Select Brazilian Holdings, Inc.
Chempar Participacoes e Emprendementos Ltd.
Select Capricorn Holdings, Inc.
Select Cassiopeia Holdings, Inc.
Select Life Holdings, Inc.
Select Orion Holdings, Inc.
Select Pacific Holdings, Inc.
Select Rio Grande Holdings, Inc.
Select Southern Holdings, Inc.
Select Southern Star Holdings, Inc.
Sociedad Mexicana Para La Industria Y El Comercio S.A.
The Portfolio Group, Inc.
Texas Commerce Equity Holdings, Inc.

Texas Commerce Operating Services Inc.
Chemical Securities of Texas, Inc.
First City
Texas-Fiduciary Services, Inc.
Texas Commerce Equities Inc.
Pyramid Agency, Inc.
Texas Commerce Information Systems, Inc.
Texas Commerce Bank Foundation, Inc.
Texas Commerce Funding Company
TexCom Venture Capital, Inc.
Texas Commerce Shareholders Company
Texas Commerce Services Company
Texas Commerce Leasing Company
Texas Commerce Investment Management Co.
Texas Commerce Bank-San Angelo, N.A.
Texas Commerce Trust Company of New York
Texas Commerce Bank National Association Houston
Texas Commerce Equipment Leasing Company
Texas Commerce International Leasing Company
Texas Commerce Investment Company

Chemical Bank owns a fifty percent interest or more in the following subsidiaries:

CB Capital Investors, Inc.
Chemical Acceptance Corporation
Chemical Acceptance Corporation I
Chemical Mortgage Acceptance Corporation
Chemical Bank of Canada
Chemical Clearing House Services, Inc.
Chemical Commercial Mortgage Banking Corp.
Chemical Commercial Mortgage Securities Corp.
Chemical Community Development, Inc.
Chemco Intemational, Inc.
Chemical International Finance, Ltd.

Banco Chemical (Portugal) S.A.
Chemical Bank-France
Chemical Bank A.G.
Chemical Investment Bank Limited
Chemical Bank CB, S.A.
Chemical Global Investors Limited
Chemical Investment Services Corp.
Chemical Mortgage Company
Chemgraphics Systems, Inc.
ChemLease Worldwide, Inc.
ChemNetwork Processing Services, Inc.
Chem Credit, Inc.
Manufacturers Hanover Leasing Corporation
MH Financial Management Systems, Inc.

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TABLE OF CITATIONS

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

All Respondents respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner.

STATEMENT OF THE CASE

Respondents agree with Petitioner that the Memorandum Decision of the Court of Appeals adequately summarizes most of

the pertinent facts and District Court proceedings. The sole basis for the Petition, however, is that the United States Court of Appeals for the Ninth Circuit should have certified an allegedly controlling question of Washington state law to the Washington State Supreme Court for resolution. Accordingly, it is important for this Court to understand when Petitioner first raised that claim during the proceedings below.

On November 27, 1992, the District Court granted Respondents' summary judgment motion on their cross-complaint against Petitioner. On July 16, 1993, the District Court found no just reason to delay an appeal of this order and, accordingly, approved entry of judgment. At no time during any of the District Court proceedings did Petitioner ever suggest that the District Court certify any questions of state law to the Washington State Supreme Court.

All issues were fully briefed by both Petitioner and Respondents before the Court of Appeals, and this matter was argued in September, 1994. Prior to the Ninth Circuit's November 7, 1994 Memorandum Decision, Petitioner never requested the Court of Appeals to certify any allegedly controlling issues of Washington state law to the Washington State Supreme Court.

On November 21, 1994, Petitioner filed a Petition for Rehearing before the Court of Appeals. That Petition for Rehearing includes, for the first time, a request that the Court of Appeals certify the question of "entity indemnity coverage" to the Washington State Supreme Court.

SUMMARY OF ARGUMENT

This is not an appropriate case for review on *certiorari*. The issue of whether a federal court should certify state law issues to a

state court rests entirely in the sound discretion of the federal court.

> [P]articularly compelling reasons must be shown when certification is requested for the first time on appeal by a movant who lost on the issue below.

Complaint of McLinn, 744 F.2d 677, 681 (9th Cir. 1984).

Here, the issue of state law is not a close one, the issue is not important to Washington State in terms of comity, and the Court of Appeals acted well within its discretion in declining Petitioner's dilatory request for certification.

REASONS FOR DENYING THE WRIT

I.

THE DECISION WHETHER TO CERTIFY STATE LAW ISSUES TO A STATE SUPREME COURT LIES WITHIN THE DISCRETION OF THE FEDERAL COURT.

In *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974), this Court held that use of a state's certification procedure "rests in the sound discretion of the Federal Court."

In his concurring opinion, Chief Justice Rehnquist explored, in some detail, the scope of the discretion of federal judges in deciding whether to use state certification procedures.

> [A] sensible respect for the experience and competence of the various intregal parts of

the federal judicial system suggests that we should go slowly in telling the courts of appeals or the district courts how to go about deciding cases where federal jurisdiction is based upon diversity of citizenship, case in which they see and decide far more than we do.

* * *

State certification procedures are a very desirable means by which a district court may ascertain an undecided point of state law, especially where . . . the question can be certified directly to the court of last resort within the State. *But in a purely diversity case such as this one, the use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisprudence.*

* * *

If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used. *The question of whether certification on the facts of this case, particularly in view of the lateness of its*

> *suggestion by petitioners, would have advanced the goal of correctly disposing of this litigation on the state law issue is one which I would leave, and I understand that the Court would leave, to the sound judgment of the court making the initial choice.*

Id. at 393-95 (emphasis added).

The Court of Appeals here properly exercised its discretion not to certify any state issues, where the request for certification was first made before the Court of Appeals on a motion for reconsideration of its decision.

> The practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal court decision will be nothing but a gamble, with certification sought only after an adverse decision. Once a decision is submitted for decision in the district court, the party should be bound by the outcome unless other grounds for reversal are present. Only in limited circumstances should certification be granted after a case has been decided. [Citations omitted.]

Perkins v. Clark Equipment Co., 823 F.2d 207, 209-210 (8th Cir. 1987). *See Complaint of McLinn, supra,* 744 F.2d at 681.

II.

THE COURT OF APPEALS EMPLOYED AN EMINENTLY REASONABLE INTERPRETATION OF STATE LAW.

The only issue which Petitioner eventually wanted certified to the Washington State Supreme Court involved a mundane interpretation of a settlement agreement and two insurance policies. The Court of Appeals, after reviewing well-established Washington state law, clearly and correctly determined that Petitioner's position was simply not well founded.

> Finally, the authorities cited by the Snohomish PUD do not support its argument that, by releasing its right to sue the individual defendants, the Snohomish PUD in effect indemnified the individuals. In *Public Util. Dists. Utils. Sys. v. Public Util. Dist. No. 1*, 771 P.2d 701 (Wash. 1989), and *Washington Hosp. Liab. Ins. Fund v. Public Hosp. Dist. No. 1*, 795 P.2d 717 (Wash. App. 1990), the courts addressed whether a particular policy covered an insured's request for indemnity when the insured brought a direct claim against its employee. The cases, however, do not support the assertion that an entity has indemnified an individual if the entity releases or forgives its claims against the individual. We, therefore, conclude the district court properly granted the Snohomish Claimants' motion for summary judgment.

See Appendix A-6 to the Petition for Writ of Certiorari.

Both the District Court and the Court of Appeals carefully considered and rejected Petitioner's state law indemnity arguments. Moreover, the Court of Appeals correctly exercised its discretion in rejecting Petitioner's last-minute request for certification.

CONCLUSION

The Court of Appeals acted completely in accord with the accepted and usual course of judicial proceedings in rejecting the certification request. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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